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No. 84-1062

In the Supreme Court of the United States

OCTOBER TERM, 1984

NANCY H. GEE, PETITIONER

v.

CLAUDE D. BOYD, III, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals applied the correct standard of review in determining that the Corps of Engineers did not act arbitrarily and capriciously in declining to prepare an environmental impact statement for a marina project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) and the opinion of the district court (Pet. App. 19a-51a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 3, 1984, and the petition for a writ of certiorari was filed on December 28, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves petitioner's longstanding efforts to halt construction of a marina at an abandoned ferry site near property she owns on Willoughby Bay in Norfolk, Virginia. In July 1982, respondent City of Norfolk filed a permit application with the United States Army Corps of

Engineers, as required by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344. The City proposed construction of a 298-slip marina, with boat maintenance facilities, at the site of an abandoned ferry and near two existing marinas. Because there was no space for parking in the area, the proposal contemplated dredging and filling in a portion of the waterway to provide needed parking. The City's permit application discussed the great imbalance between supply and demand for boat slips in the Norfolk area and noted the suitability of the proposed location for a marina. Pet. App. 2a-3a, 20a.

The Corps issued a preliminary environmental assessment (EA) on September 27, 1982.[1] The EA noted that the Norfolk area has an acute shortage of boat slips and that the project would increase the number of slips in the area, provide additional employment opportunities, and increase the City's tax base. Pet. App. 4a. The EA also noted that economic studies had shown that a minimum of 260 slips was needed for the project to be economically feasible (*ibid.*). The need for parking to accommodate boaters meant that fill would be placed in a portion of the waterway. The EA acknowledged that the fill aspect of the project "represents a significant adverse impact upon the aquatic ecosystem." *Id.* at 5a. In discussing that impact, however, the EA noted that the habitat that would be disrupted was "among the least productive of coastal ecosystems" (*ibid.*).

In considering alternatives to the proposal, the EA noted (C.A. App. 124):

[1]As explained by the court of appeals (Pet. App. 15a-16a n.1), an EA is a brief document prepared to determine whether or not a proposed action will have a significant effect on the human environment, thereby requiring preparation of an environmental impact statement under Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

> The need for additional marina space has to be met, and it would appear more practical to locate one large marina project in an area ideally suited for a marina where environmental productivity is low than it would be to piecemeal several smaller marina projects in less ideal locations where ecological productivity is likely to be higher and the cumulative impacts of an equal number of marina spaces is likely to be significantly larger. [2]

The final EA, issued by the Corps on December 10, 1982, contained the same findings as the preliminary EA and concluded that the project would have no significant impact on the human environment, thereby making unnecessary the preparation of an environmental impact statement (EIS) under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). On the same day, the Corps issued a permit to the City clearing the project, subject to 21 general conditions and 24 special conditions. Pet. App. 5a.

After the permit had been issued, petitioner, a partner in a venture that owns property near the site of the proposed marina, became aware of the project. She wrote to Colonel Hudson[3] in January 1983, complaining about lack of notice and objecting to the marina plans.[4] Colonel Hudson considered petitioner's objections, but he advised her by letter

[2]The EA noted that the "no-build" alternative would be the least environmentally damaging option, but it also noted that this alternative would fail to meet the pressing need for marina space (C.A. App. 125).

[3]At the time, Colonel Ronald E. Hudson was the District Engineer of the Norfolk District of the Corps of Engineers. Colonel Claude D. Boyd, III now holds that position, and petitioner has substituted Colonel Boyd in this action pursuant to Rule 40.3 of the Rules of this Court.

[4]Upon receipt of the City's permit application, the Corps published a public notice of the application, and it also sent actual notices to 659 agencies and individuals. A 30-day public comment period followed,

dated May 12, 1983, that he had decided not to revoke or suspend the permit. Pet. App. 6a. Thereafter, the Corps approved the City's assignment of the permit to respondent Lower Chesapeake Associates.

2. Petitioner challenged the issuance of the permit by filing suit in the United States District Court for the Eastern District of Virginia. She alleged that (1) the Corps failed to verify the accuracy of certain financial data submitted by the applicant, (2) the Corps violated NEPA by not preparing an EIS, and (3) Colonel Hudson failed to give adequate consideration to alternatives and mitigation. After reviewing the administrative record and hearing argument, the district court granted summary judgment for the respondents and dismissed the complaint (Pet. App. 19a-51a). Both the district court and the court of appeals denied petitioner's motions for an injunction pending appeal (Pet. 16). Accordingly, construction commenced and is continuing.

The court of appeals affirmed the district court in all respects (Pet. App. 1a-18a). In reviewing petitioner's contention that the Corps should have prepared an EIS, the court held that the Corps' decision that the marina would have no significant impact on the human environment was not arbitrary (*id.* at 9a). The court noted that the marina was to be built at an abandoned ferry site and that two existing marinas were operating near the site (*ibid.*). The court also noted that the Corps had found that no vegetated wetlands or unique areas of geographic, historic, or cultural significance would be affected by the project (*id.* at 9a-10a; see 40 C.F.R. 1508.27(b)). The court agreed with the Corps

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during which no objections were received. Pet. App. 20a. Petitioner states (Pet. 13-14) that 47 property owners in the area submitted petitions objecting to the project. Petitioner never made that allegation in the trial court or the court of appeals, and she does not offer any record support for it.

that the only environmental impact of the project — the filling of an ecologically unproductive portion of the waterway — did not amount to a significant effect on the *human* environment within the meaning of NEPA (Pet. App. 8a-9a).

The court of appeals also held that the Corps did not act arbitrarily in declining to consider a smaller marina as an alternative to the proposed 298-slip marina (Pet. App. 11a-14a). The court noted that a smaller project almost always will result in reduced environmental impacts, but it did not believe that NEPA requires consideration of a smaller project in all cases (*id.* at 13a). The court concluded that the obligation to consider a smaller project arises only when that alternative will accomplish essentially the same purposes as the proposed project or will result in a significant reduction in ecological harm (*ibid.*). Here, the court concluded that the failure to consider a smaller marina was not arbitrary in light of the great demand for a large marina, coupled with the fact that *any* marina project would entail some filling of the waterway (*id.* at 13a-14a).

Finally, the court of appeals rejected petitioner's contention that the Corps had improperly relied upon unverified financial data. The court found no record support for petitioner's assertion that the developer's projected financing rate of 18% had been a key element in the Corps' decision to approve the project (Pet. App. 14a). Instead, the court found that the developers proposed a 298-slip marina because of the tremendous need for marina slips, and not because of the projections concerning financial profitability (*id.* at 15a). Inasmuch as the projected interest rate was not a critical factor in the Corps' decision to issue the permit, the court refused to find a NEPA violation in the Corps' failure to verify that projected rate (*ibid.*).

ARGUMENT

1. Petitioner asserts (Pet. 19-40) that the court of appeals erred in applying the arbitrary and capricious standard of review to the Corps' decision not to prepare an EIS in this case, in lieu of the ostensibly stricter test of "reasonableness." [5] Although petitioner contends that there is a great difference between the two standards, in reality the issue is a semantic quibble that results in little, if any, practical difference in result. Accordingly, review by this Court is not warranted.

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[5]Five circuits test an agency's determination not to prepare an EIS under the traditional arbitrary and capricious standard for review of agency action. *Grazing Fields Farm* v. *Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980); *Hanly* v. *Kleindienst*, 471 F.2d 823, 828-829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973); *Webb* v. *Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983); *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225, 229 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Sierra Club* v. *Peterson*, 717 F.2d 1409, 1413 (D.C. Cir. 1983).

Four other circuits have enunciated a "reasonableness" standard of review. *Save Our Ten Acres.* v. *Kreger*, 472 F.2d 463, 466 (5th Cir. 1973); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980); *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973). The Eleventh Circuit presumably falls within this grouping as well, by virtue of *Bonner* v. *City of Prichard*, 661 F.2d 1206 (1981) (en banc) (adopting as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981).

The Third Circuit has applied the reasonableness test in one case but withheld judgment on whether that standard would be proper in all cases. *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F.2d 732, 741-742 (1982). The Sixth Circuit has declined to choose between the two standards. *Boles* v. *Onton Dock, Inc.*, 659 F.2d 74, 75-76 (1981).

Although this Court has not addressed the issue directly, it has assumed that the arbitrary and capricious standard applies. In *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976), the Court held that an agency's determination not to prepare a "regional" EIS in the absence of a proposal for "regional" action should be upheld "[a]bsent a showing of arbitrary action."

The circuits have recognized that the issue presented by petitioner is of no real consequence. As the Sixth Circuit stated in *Boles* v. *Onton Dock, Inc.*, 659 F.2d 74, 75 (1981), "[n]o matter what standard courts have used, they have looked to see whether the Corps made a reasoned determination." See also *Town of Lower Alloways Creek* v. *Public Service Electric & Gas Co.*, 687 F.2d 732, 742 n.23 (3d Cir. 1982) ("In some instances, * * * the distinction between the two standards tends to blur. Even under the arguably 'lower'[arbitrary and capricious] standard, agencies are not entitled to unbridled discretion in determining whether prepartion of an EIS is necessary.").

Thus, circuits that apply the arbitrary and capricious standard often speak in terms of reasonableness as well. See, *e.g.*, *Quinonez-Lopez* v. *Coco Lagoon Development Corp.*, 733 F.2d 1, 2 (1st Cir. 1984); *Town of Orangetown* v. *Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983), cert. denied, No. 83-857 (Mar. 19, 1984); *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1002 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980). And, on the other side of the coin, circuits that apply the "reasonableness" standard of review are no more likely to overturn an agency decision not to prepare an EIS than are the circuits that employ the arbitrary and capricious test. Those circuits that apply the "reasonableness" standard of review require a plaintiff to raise a substantial environmental issue by showing that the project "will significantly degrade the human environment." *Vieux Carre Property Owners, Residents & Associates, Inc.* v. *Pierce*, 719 F.2d 1272, 1279 (5th Cir. 1983). Accord, *Foundation for North American Wild Sheep* v. *United States Dep't of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982); *Winnebago Tribe of Nebraska* v. *Ray*, 621 F.2d 269, 271 (8th Cir.), cert. denied, 449 U.S. 836 (1980). Such a showing clearly is at least as demanding as one requiring a plaintiff to demonstrate arbitrary and capricious agency action.

It is thus plain that no significant distinction exists between the two standards. Litigants and the courts of appeals have managed to cope with the semantic distinction raised by petitioner for more than a decade, with no apparent effect on the outcome of cases. This Court's intervention is therefore unnecessary.

It is also clear that petitioner would not benefit from the application of a different standard, for she has failed to explain in what way the Corps' decision in this case was somehow unreasonable even though it was not arbitrary and capricious. It is beyond dispute that petitioner opposes the project. She has not, however, pointed to any possible environmental impacts that the Corps failed to consider. Petitioner merely disagrees with, and urged the courts below to disagree with, the Corps' conclusion that the project would not have a significant effect on the human environment. That sort of second-guessing runs afoul of this Court's admonition in *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976): "Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions."

2. a. Petitioner also criticizes (Pet. 40-46) the court of appeals for applying the arbitrary and capricious standard of review to the Corps' consideration of alternatives to the project. Petitioner relies upon an incorrect reading of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), to argue that a reasonableness test governs judicial review of an agency's consideration of alternatives. There is no such holding in *Vermont Yankee*. Instead, the Court there stated, in reversing the court of appeals' determination that the agency's rejection of an alternative had been arbitrary and capricious (435 U.S. at 554 (emphasis added)):

> In sum, to characterize the actions of the Commission as "*arbitrary or capricious*" in light of the facts then available to it as described at length above, is to deprive those words of any meaning.

Quite clearly, this was not a rejection of the arbitrary and capricious standard of review.

In any event, petitioner has once again failed to demonstrate how application of a different standard would have produced a different result in this case. It is undisputed that a great demand for marina spaces exists in the Norfolk area. A smaller project — the alternative that petitioner claims was ignored — clearly would not fill that need.[6] Indeed, as the Corps noted in its EA, the probable result of a smaller marina in one location would be more marinas elsewhere in the area. See note 6, *supra*. In these circumstances, it was neither arbitrary and capricious nor unreasonable for the Corps to rule out the option of a smaller marina.

This is particularly so because the Corps' role in this project was simply to pass on the permit application; consideration of a smaller marina would be pointless if, as here, the developer had expressed no interest in that "alternative." As the court recognized in *Beaufort-Jasper County Water Authority* v. *Corps of Engineers*, No. 81-984-8 (D.S.C. May 10, 1984), *reprinted in* 14 Envtl. L. Rep. (Envtl. L. Inst.) 20732, 20735 (Oct. 1984):

> Since the project involved was essentially private, the site selection, financing, design, construction and operation of the facility were all matters within the

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[6]It should be noted that the Corps' EA did not totally ignore the option of a smaller marina. See pages 2-3, *supra*; C.A. App. 124. As there explained, the Corps reasoned that, in light of the great demand for additional marina slips, one large marina in the proposed location was environmentally preferable to several smaller marinas in areas likely to be more environmentally sensitive.

> discretion of the applicant. Therefore, the only reasonable alternatives were to issue the permit, issue the permit with conditions, and deny the permit.

On the record in this case, therefore, it is clear that formal consideration of a smaller marina would have served no purpose other than to waste time and resources. The standard of review is irrelevant to that conclusion.

b. Whatever the standard of review, the cases cited by petitioner do not support her contention that the Corps erred in failing to consider at length the alternative of a smaller marina. Only two cases cited by petitioner discuss the need to consider alternatives when a project is found *not* to have a significant effect on the human environment, and neither supports petitioner's claim of error. In *City of New York* v. *United States Dep't of Transportation,* 715 F.2d 732 (2d Cir. 1983), cert. denied, No. 83-770 (Feb. 27, 1984), the Department of Transportation had concluded that no EIS was required for the transportation of radioactive materials by highway. The court of appeals upheld the agency's brief consideration of alternatives, noting that the finding of no significant impact "substantially diminishes the claim that the Department acted arbitrarily in declining to consider barging as a national alternative" (715 F.2d at 744).[7] Accord, *Beaufort-Jasper County Water Authority,*

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[7]The court felt bound by prior circuit precedent (*Hanly* v. *Kleindienst,* 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973), to hold that some consideration of alternatives was required even though the project would have no significant impacts. Nevertheless, the court stated (715 F.2d at 744):

> Though we have required an agency to give some consideration to alternatives even though preparation of an EIS is not required, * * * it remains something of an anomaly to insist that an agency assess alternatives for an action that it has determined will not have a "significant" effect upon the environment. * * * But even accepting the teaching of *Hanly,* as we must, we are of the view that an agency's finding of no significant impact, if otherwise valid, permits the agency to consider a narrower range of alternatives than it might be obliged to assess before undertaking action that would significantly affect the environment.

supra. Most of the other cases cited by petitioner (Pet. 47-50) deal with an agency's obligation to discuss alternatives in an EIS, after the agency has determined that the proposed action *will* have a significant effect on the human environment. Those cases have no bearing on the present case, and they furnish no basis for further review.

3. Finally, petitioner argues (Pet. 52-56) that the Corps had a duty to verify the developer's projection of an 18% interest rate for financing the marina project.[8] Petitioner's contention appears to be that evaluation of the project using a lower interest rate would have led to the conclusion that a smaller marina was economically feasible. This fact-bound dispute does not merit further review. Furthermore, as the court of appeals recognized (Pet. App. 14a-15a), the 18% interest rate simply was not a major factor in the decisionmaking process. It was the great need for slips, not the interest rate, that led the developer to propose a 298-slip marina (*id.* at 15a). The Corps also cited the need for additional slips, not the projected interest rate, as the justification for the project (C.A. App. 124). Petitioner has failed utterly to demonstrate that the Corps would have reached a different result had it considered a lower interest rate.

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[8]It should be noted that this rate was given only as a projection; it was never stated as a fact. See C.A. App. 89. Moreover, as the district court noted, petitioner failed to offer any evidence bearing on interest rates in the administrative proceedings (Pet. App. 46a).

CONCLUSION

The petition for a writ of certiorari should be denied.[9]

Respectfully submitted.

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[9]The non-federal respondents have requested us to state that they wish to adopt this brief as their response to the petition.

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